February 28, 2001

BY FACSIMILE TO 907-465-3075;
ORIGINAL FOLLOWING BY U.S. MAIL

Mr. Randy Bates
Division of Governmental Coordination
Office of the Governor
P.O. Box 110030
Juneau, Alaska 99811-0030

Re: Comments on Proposed Revisions to ACMP Regulations (6 AAC 50)

Dear Mr. Bates:

Thank you for this opportunity to comment on the proposed revisions to the Alaska Coastal Management Program (ACMP) procedural regulations found in 6 AAC Chapter 50. It is obvious that a great deal of hard work went into reorganizing and attempting to clarify the existing regulations. That effort resulted in several improvements.

As revised, however, the proposed regulations create several problems (identified below) that do not exist in the current regulations. Some of these problems stem from revisions to the "Definitions" in Article 9 and, therefore, could be remedied by (i) restoring deleted definitions; (ii) adding precise definitions for undefined terms; or (iii) editing newly proposed definitions. A few of the problems cannot be remedied so easily and thus it may be more prudent to refrain from adopting the problematic provisions.

Specific Comments

1. Use of the "Optional Preliminary Consistency Determination" would result in abandonment of the carefully prescribed processes and, in effect, could convert the ACMP review process into a mini-NEPA process by requiring the coordinating agency to make determinations about potential impacts which it is not authorized to do under Alaska law.

   The proposed regulations painstakingly establish processes for conducting the three basic types of ACMP review (for state regulated activity; for federal activity; for federally regulated activity). Those processes prescribe time lines for the various steps in the processes, allowing the coordinating agency sufficient discretion to extend deadlines within the time line if appropriate (e.g., to accommodate the need for additional information or further review).

   The "Optional Preliminary Consistency Determination" process described in proposed 6 AAC 50.910 would undermine the established processes. It would allow the coordinating agency to abandon the time lines set forth for each of the three ACMP review processes and create new, project-specific processes and schedules based on a determination by the coordinating agency "that the project is likely to have more than minimal impacts to coastal uses or resources..." and will attract "significant public interest...." This separate "option" to abandon the established processes is entirely unnecessary in light of the flexibility allowed in adjusting the schedules for the established processes.

   Additionally, the standard for invoking this separate review "option" is ill defined and thus potentially could result in arbitrary and capricious decisionmaking as to whether to exercise the option. This is due largely to the fact that "minimal impact" is proposed to be defined as "a negligible disturbance to coastal uses or resources." Thus, the definition is circular: "negligible disturbance" has no more meaning than "minimal impact." Further, "negligible disturbance" is not proposed to be defined, and could not be readily defined in any meaningful way that would support decisions about whether to follow the established processes or to set up a project-specific process.

   Finally, this proposal to allow use of a special, potentially much longer, review process when the coordinating agency "determines" that impacts will be more than "minimal" is analogous to the National Environmental Policy Act (NEPA) process' distinction between environmental analyses (EAs) and environmental impact statements (EISs). Alaska's Legislature, however, has not authorized the transmutation of the ACMP into a mini-NEPA process. In view of the limited and specific purposes and authorities

underlying the ACMP, proposed 6 AAC 50.910 should **not** be adopted.

Similarly, the test for deciding between a 30-day and a 50-day review process should not rest on the degree of impacts anticipated (e.g., "minimal impacts") as proposed 6 AAC 50.235 contemplates. Under the existing regulations, that decision is based on how much time the agencies are expected to need to coordinate their authorizations and issue permits. There is not necessarily a direct correlation between the degree of potential impacts and the time required to issue authorizations, especially where the standard for whether impacts are "minimal" is itself an undefined "negligible disturbance" test. The potential for disputes and for allegations of inequitable application and/or abuse of discretion will be great if the degree of potential impacts is used as the measure for the length of the review process.

Accordingly, proposed 6 AAC 50.235 should be revised to restore the existing approach of choosing between the 30 and 50 day processes based on how much time the agencies need to issue authorizations. That will obviate the need for the coordinating agency to make qualitative "determinations" about the degree of "impacts," something that is clearly beyond the coordinating agency's scope of authority as the coordinator of the ACMP process. With proposed 6 AAC 50.910 eliminated and proposed 6 AAC 50.235 modified, the circular definition for "minimal impacts" at proposed 6 AAC 50.990(33) can be eliminated as well.

2. The proposed regulations' inconsistent references to "the ACMP" or "the program" versus the "enforceable policies" of the ACMP create confusion and the potential for disputes about (i) what an applicant must certify; (ii) what may be commented upon; (iii) what may be the bases for conditions; and (iv) what is at the heart of the consistency determination.

In many places, the proposed regulations speak of consistency with the enforceable policies of the ACMP, thus clearly tying the provisions in question to one of the two concrete components of the ACMP. Those two components are the enforceable policies of the coastal resource districts and the substantive regulatory standards in 6 AAC 80 & 85. In other places, however, the proposed regulations speak of a project being "consistent with the ACMP" or with "the program" generally (e.g., proposed 6 AAC 50.200, 365, 375, 385(b)(3), 405 & 990(14)). These inconsistent references create significant ambiguities, especially in light of the proposed changes to key definitions.

The proposed revisions to the "Definitions" section would eliminate the definition of "consistent" (bracketed deletion following proposed 6 AAC 50.990(16)) and would reduce the definition of "ACMP" to a generic description of what the mnemonic stands for–"Alaska Coastal Management Program." As such, the proposed revisions

would rob the relevant definitions of all references to standards (e.g., regulatory ones in 6 AAC 80, the district enforceable policies). Thus, it would no longer be possible to use the definitions to make sense of the operative provisions in which the expression "consistent with the ACMP" appears.

The simple solution would be to retain the current definitions for "ACMP" and "consistent." Without those definitions, the regulations will be hopelessly ambiguous in several respects, such that neither an applicant, nor the public, nor the review participants, nor the council or a court reviewing a disputed determination will be able to tell what was contemplated by references to "consistent with the ACMP." Another (less simple) solution would be to modify the language "the ACMP" or "the program" every time such an expression is used throughout the regulations, so that the regulatory standards and enforceable policies constituting the ACMP are clearly referenced. Retention of these key definitions as well as the suggested language modifications would best clarify consistent application of the ACMP process.

3. <u>The "alternative measure" term used in numerous places throughout the proposed regulations is ill defined, creating confusion about what such measures are and how they are to be used</u>.

The term "alternative measure" appears in several different contexts in the proposed regulations. This is a new term, not used in the current regulations. In some contexts, it appears to be synonymous with a "condition" or "stipulation" which must be imposed to ensure consistency with the ACMP standards (regulations and enforceable policies). In other contexts, use of the term suggests measures which can be proposed by someone (e.g., the coastal resource district), but which are simply optional ways of achieving consistency with the ACMP substantive standards. (See, for example, proposed 6 AAC 50.365, which suggests that the federal agency must be informed of any and all measures it might add to the project to persuade the state that the federal project is consistent.) In addition, the term is sometimes used in conjunction with the concept of achieving consistency with "the ACMP." Thus, its varied use compounds the ambiguity problem identified in 2 above.

Indeed, in the proposed definition for the term itself, this compounding problem appears. Proposed 6 AAC 50.990(4) states: "'alternative measure' means a requirement necessary to ensure the activity is consistent with the ACMP." Since significant changes are proposed for the current definitions of "ACMP" (proposed to be made generic) and "consistent" (proposed to be eliminated), the proposed definition of "alternative measure" is itself highly ambiguous. In context, use of the term creates much confusion.

For instance, if adopted, proposed 6 AAC 50.055(b)(2) would allow a coastal resource district to "include an alternative measure identified in a final consistency determination issued under 6 AAC 50.265 in an authorization for the project that is issued under the coastal resource district's Title 29 authority." It is unclear whether this would allow the district to include in its authorization only an "alternative measure" expressly identified as necessary for consistency with the district's enforceable policies, or to include any of several proffered "alternative measures" no matter how those measures relate to the ACMP standards.

At a minimum, the definition for "alternative measure" needs to be further developed (either within the definition itself, or by retaining the current definitions for "consistent" and "ACMP"). Otherwise, disputes about what "alternative measures" can be proposed by review participants and imposed on project proponents are inevitable. Additionally, each of the many places in the regulations where the term "alternative measure" is used needs to be scrutinized in light of the definition ultimately chosen, to ensure that no ambiguities remain.

4. <u>The various proposed regulations affecting the scope of the ACMP would inappropriately expand the coordinating agency's discretion, creating the potential for errors or abuses that could result in artificially broad, duplicative reviews</u>.

Proposed 6 AAC 50.025 abandons the existing requirement that the scope of review be based on specific kinds of information (e.g., the applicant's proposal and the coastal project questionnaire) and instead relies on the coordinating agency to "determine the scope of the project subject to a consistency review." If adopted, it would set the minimum scope quite broadly, requiring among other things inclusion of each "activity" needing an agency authorization, as well as activities that do not, if the "project," as proposed, could not be conducted without those activities. Thus, the regulation would require the coordinating agency (in consultation with the resource agencies) to make a determination of the scope of the "project," which necessarily would require determining what the "project" is as proposed by the applicant.

"Project," however, would be a defined term under the proposed regulations (6 AAC 50.990(22)). It would mean "all activities that will be part of a proposed coastal development, including associated facilities, ***that are subject to the consistency review requirements under this chapter***." (Emphasis added.) To "determine the scope of the project" as required by proposed section 025, the coordinating agency, therefore, necessarily would have to decide what activities "are subject to the consistency review requirements," which in turn requires determining the scope of the review. Thus, the definition of "project" does not inform the determination required under section 025 at all; it depends on it. Accordingly, the coordinating agency is left only with its

discretion, and advice from the resource agencies; the proposed regulations provide no guidance on how to exercise that discretion.

In addition, proposed 6 AAC 50.700 would vest the coordinating agency with discretion to require that the ACMP review for a "project" include activities already determined categorically consistent with the ACMP standards (via a previous categorical or general consistency determination, or a general concurrence determination). In fact, that would be the default position, subject only to the possibility that the agency might exclude those activities from the project-specific review if they constitute a "temporary use with minimal impacts to coastal uses and resources." Since "minimal impacts" would be defined as "negligible disturbance," once again the determination would be left to the unguided discretion of the coordinating agency.

Perhaps the simplest solution to most of these problems would be to eliminate proposed subsection (a) of 6 AAC 50.025 and convert proposed subsection (b) into concrete, objective criteria to be used in setting the scope of the review. Those changes would obviate the need to clarify the definition of "project," at least in this context. As to categorically consistent activities for which an applicant can obtain a general permit that has already gone through the ACMP process, there is no reason to broaden the scope of review to, in effect, re-review those activities. Proposed 6 AAC 50.700 should be modified accordingly.

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As a general comment, some of the problems identified above evidence a trend toward vesting the coordinating agency with decisionmaking-type discretion far broader than necessary for an agency that, in its regulatorially directed coordinator role, is supposed to be coordinating the ACMP review process, not usurping other State and Federal regulatory agency's purview in making independent decisions about the permittability of a proposed activity. An ACMP consistency determination is not a super-permit governing all aspects of a development project. Rather, it is supposed to be the memorialization of a collaborative process of review in which the coordinating agency serves as facilitator. As such, any proposed changes to the ACMP process regulations in 6 AAC 50 should be carefully crafted to avoid shifting the coordinating agency's role toward making substantive decisions such as whether a proposed "project" will have only "minimal impacts."

If you have any questions about the general or specific comments above, please feel free to contact me at 907-586-3340.

Very truly yours,

Terry L. Thurbon